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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 518

MARGARET E. ALLRED, ET AL.,
Appellants,

v.

H. L. HEATON, ET AL.,
Appellees.

MOTION TO DISMISS OR AFFIRM

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellees, pursuant to Rule 16 of the Revised Civil Rules of the Supreme Court of the United States, move that this case be dismissed on the ground that it does not present a substantial federal question, and in the alternative, move that the final judgment and decree of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

This case is an action for declaratory judgment to declare the eligibility of Appellants to enroll as students in the Agricultural and Mechanical College of Texas.

The facts of this case are stated in the opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, which opinion is set forth in Appendix "A" to the jurisdictional statement of Appellants and is reported at 336 S.W. 2d 251.

OPINIONS BELOW

The District Court of Brazos County, Texas, 85th Judicial District, entered a judgment declaring that Appellants were not eligible to enroll as students in the Agricultural and Mechanical College of Texas. The Court of Civil Appeals for the Tenth Supreme Judicial District of Texas on the 19th day of May, 1960, affirmed the judgment of the trial court. Petitioners' (Appellants') application for writ of error was refused, no reversible error, by the Supreme Court of Texas on October 12, 1960. Appellants did not file a motion for rehearing in the Supreme Court of Texas.

JURISDICTION

It is questioned by Appellees that any substantial federal question is presented for adjudication by the Supreme Court of the United States.

In the alternative Appellees contend that the final judgment and decree of the Court of Civil Appeals for the Tenth Supreme Judicial District should be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

STATUTES INVOLVED

The statutes involved are produced in the Appendix to this motion (pages 11-15).

ARGUMENT

This case was instituted by Appellants to determine their eligibility to enroll as students in the Agricultural and Mechanical College of Texas. The facts involved in this case are substantially identical with the facts involved in *Bristol, et al. v. Heaton, et al.*, 317 S.W.2d 86, wherein this Court on April 6, 1959, dismissed the appeal and treating the papers whereon the appeal was taken as a petition for certiorari, denied certiorari. *Lena Ann Bristol, et al. v. H. L. Heaton, et al.*, No. 581 Misc., 359 U.S. 230, 79 S.Ct. 802, rehearing denied, 359 U.S. 999, 79 S.Ct. 1123.

The only evidence attempting to show Appellants' eligibility to enroll as students in the Agricultural and Mechanical College of Texas is stated in Paragraph No. III of the Agreed Stipulation (Trial Court S.F. 8): "All three women are graduates of accredited Texas high schools."

H. L. Heaton, Director of Admissions and Registrar of the Agricultural and Mechanical College of Texas, testified that graduation from an accredited Texas high school was not the only requirement (independently of sex) to enroll in the College. (Trial Court, S.F. 61).

In discussing the evidence concerning Appellants' eligibility the Court of Civil Appeals said:

> ". . . the only evidence attempting to show that the named plaintiffs were members of an eligible class (independent of sex) to enroll as students in the college is stated in paragraph three of the agreed stipulations. There we find 'All three women plaintiffs are graduates of accredited Texas High Schools.' Mr. Heaton, Director of Admissions and Registrar at the college testified that graduation from an accredited high school was not the only requirement, independent of sex, permitting enrollment in the college. That statement is undenied and is not challenged.
>
> ". . .
>
> ". . . we think the petitioners had the burden to introduce evidence in order to establish that they are members of a class eligible (independently of sex) to enroll as students in the college; otherwise they would not be persons constituating a class, and could not, therefore, represent unnamed plaintiffs who would be bound by issues in this case.
>
> ". . . So, again, we say that the appellants have wholly failed to carry their burden of showing

that they are entitled to maintain their suit as a class action. . . ."

We, therefore, respectfully submit that the judgment of the state court is final on the question of whether Appellants proved their eligibility to enroll as students in the Agricultural and Mechanical College of Texas independently of sex; and, therefore, contend that the judgment of the State court rests on adequate and independent State grounds.

The Supreme Court of the United States will not review judgments of State courts that rest on adequate and independent State grounds. *Black v. Cutter Laboratories*, 351 U.S. 292, 298; *Herb v. Pitcairn*, 324 U.S. 117; *Klinger v. State of Missouri*, 13 Wall. 257; *Murdock v. City of Memphis*, 20 Wall 590; *Berea College v. Kentucky*, 211 U.S. 45; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157; *Fox Film Corp. v. Muller*, 296 U.S. 207.

Furthermore, it was pointed out in *California Water Service Co., et al. v. City of Redding, et al*, 304 U. S. 252, 58 S.Ct. 865, 867 (1938):

> ". . . The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105, 106, 53 S.Ct. 549, 77 L.Ed. 1962. . . ."

As the opinion of the Court of Civil Appeals states, the record shows that Appellants wish to enter the

Agricultural and Mechanical College of Texas principally on the ground that it is more convenient and less costly to Appellants than attendance at any other school because it is nearer their home, and if they resided near any other State supported college or university in Texas, they would probably attend the school nearest their home. (Trial Court S.F. 6, 7, 8).

In the case of *Hamilton et al v. Regents of the University of California*, 293 U.S. 245, this Court upheld the right of the University of California, a Land Grant College, to require compulsory military training. The Appellant in the case contended that his privileges and immunities as a citizen of the United States had been violated since the University would not admit him unless he would comply with the military training requirments. In overruling this contention, this Honorable Court said:

> ". . . The 'privilege' of attending the University as a student comes not from federal sources but is given by the State. It is not within the asserted protection. . . .
>
> ". . . *The fact that they are able to pay their way in this University but not in any other institution in California* is without significance upon any constitutional or other question here involved. . . ." (Emphasis added).

The opinion by the Court of Civil Appeals also points out that the Agricultural and Mechanical College of Texas is one of seven State supported military colleges in the United States. The participants

in the military program at A. & M. are organized on a corps basis. The men are organized into military units and they are constantly under military discipline twenty-four hours a day, seven days a week. The Supreme Court of the United States has recognized the constitutional authority of the States "to train its able bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them to serve in the United States army or in State militia . . . the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends . . ." *Hamilton v. Regents of the University of California, supra.*

Appellants apparently recognize the authority of the State in this area, but contend that since the curriculum of the Agricultural and Mechanical College is not restricted solely to technical and military courses, but includes courses of instruction which Appellants contend would be "suitable for women," the State is without authority to exclude women from the institution. It would appear that if Appellants' constitutional concept is applied to the Agricultural and Mechanical College of Texas, it must, for the same reasons, be equally applicable to the service academies of the United States, since it is well known that the curricula of these academies include courses of studies in the liberal arts and social sciences which would undoubtedly be "suitable for women." Appellees have failed to find any authority in any jurisdiction to support such concept.

The Court of Civil Appeals further pointed out in its opinion that the system of higher education in the State of Texas includes eighteen institutions, one of which is all-male and one of which is all-female. Sixteen of these institutions are open to both sexes. The system of higher education in Texas, which includes each individual institution, fulfilling the respective objects of its creation, has been devised to meet and fill the total and diverse educational needs of the State.

The system of higher education in this nation, both public and private, has long recognized, and continues to recognize, a legitimate and material basis for both all-male and all-female institutions, together with co-educational institutions. Included among them are the names of some of the most illustrious institutions of higher learning in the nation. We can only conclude that the need for such institutions is real. Both their number and prestige substantiate this point. Such a system of higher education does not violate any provision of the Constitution of the United States.

Applying the above principles to the appeal, the judgment of the State court rests on adequate and independent State grounds. It presents substantially the same facts and questions as were presented in *Bristol v. Heaton*, supra, wherein this Court entered the following order:

> "The motion to dismiss is granted and the appeal is dismissed. Treating the papers where-

on the appeal was taken as a petition for certiorari, certiorari is denied." 359 U.S. 230, 70 S. Ct. 802, reh. den., 359 U.S. 999, 79 S.Ct. 1123.

Applying these principles to the instant case the lack of any substantial federal question exists for the reasons:

(1) Because the judgment of the State court rests on adequate and independent State grounds;

(2) Because it is obviously without merit; and

(3) Because its unsoundness so clearly results from the previous decision of this court as to foreclose the subject.

It is, therefore, respectfully submitted that this appeal should be dismissed for the reason that Appellants have not presented for adjudication by the Supreme Court of the United States any substantial federal question.

In the alternative it is respectfully submitted that the final judgment of the State court should be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

CONCLUSION

We respectfully submit, therefore, that the Appellants do not present a substantial federal question and this appeal should be dismissed or the judgment and decree of the Court of Civil Appeals for the

Tenth Supreme Judicial District of Texas should be affirmed.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

LEONARD PASSMORE
First Assistant Attorney General

JOHN REEVES
Assistant Attorney General

Capitol Station
Austin, Texas

Attorneys for Appellees

Service

I, Will Wilson, Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing motion has been forwarded by United States Mail, First Class, Postpage Prepaid, to Appellants' Attorney, Mr. John M. Barron, P. O. Box 587, Bryan, Texas.

.....

WILL WILSON
Attorney General of Texas

APPENDIX

Statutes Involved

Article 2607, Revised Civil Statutes of Texas, 1925

"The Agricultural and Mechanical College of Texas, located in Brazos County, and by the Constitution made and constituted a branch of the University of Texas, for instruction in agriculture, the mechanical arts and the natural science connected therewith, shall be managed and controlled as herein provided."

Art. 2608; Revised Civil Statutes of Texas, 1925

"The leading object of this College shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanical arts, in such manner as the legislature may prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."

Art. 2610, Revised Civil Statutes of Texas, 1925

"The government of the Agricultural and Mechanical College shall be vested in a Board of Directors composed of nine persons. Said board shall elect from their number a president of the board, who shall call said board together for the transaction of business whenever he deems it expedient. The board shall have the right to make and use a common seal."

Art. 2613, Revised Civil Statutes of Texas, 1925

"The Board of Directors is charged with the duties and empowered to do and perform the acts hereinafter set forth as follows:

. . .

6. The board shall also, from time to time, make such by-laws, rules and regulations for the government of said College as they may deem necessary and proper for that purpose, and shall regulate the course of study, the rates of tuition, the manner of performing labor, and the kind of labor to be performed by the students of said college, and shall also prescribe the course of discipline necessary to enforce the faithful discharge of the duties of the professors, officers and students.

. . ."

Art. 2919e—2, Texas Civil Statutes (Acts 1955, 54th Legislature, Chapter 487)

Texas Commission on Higher Education Purpose of Act

"Section 1. The purpose of this Act is to establish in the field of public higher education in the State of Texas an agency of the State through which additional leadership and coordinating services can be provided for the senior higher education systems and institutions and their governing boards, to the end that an efficient and effective State system of higher education may be developed.

Sec. 2. There is hereby established the Texas Commission on Higher Education, hereinafter referred

to as the Commission, which shall have its office, in Austin, Texas. It shall carry out only such functions as are herein enumerated and such other functions as the Legislature may assign to it. Functions vested in the governing boards of the respective institutions of higher education, not specifically delegated to the Commission, shall be performed by such boards. The coordinating functions and other duties delegated to the Commission in this Act shall apply to all institutions, branches, and activities under the jurisdiction of the several governing boards of the State higher education institutions and systems.

. . .

Sec. 11. The Commission shall make a continuing study of the program and degree offering of wholly State-supported colleges and universities in relation to the needs of the State and shall report the results of the studies to the governing boards. No new department, degree program, or certificate program shall be added at any State-supported college or university after September 1, 1956, except by specific prior approval by the Commission. The Commission shall order the consolidation or elimination of programs where such action is in the best interests of the institutions themselves and the general requirements of the State of Texas; provided, however, that the governing board concerned may be formal affirmative action, and notice thereof to the Commission by June 1st, following direction from the Commission to consolidate or eliminate such activities, continue the activity in question. Notice of action of the Commission in eliminating or consolidating activities shall be given to the governing

board concerned by April 1st preceding the fall term in which the action is to take effect. The Commission shall make a report to the Legislature and the Governor i nthe event of non-compliance of a governing board in regard to an order or action of the Commission. Any bill which would create an additional senior institution of higher education shall be submitted, either prior to introduction or by the standing committee considering same, to the Commission for its opinion as to need by the State therefor, and the Commission shall report its findings to the State Budget Offices and the Legislature.

Sec. 12. The Commission shall make a continuing study of the needs of the State, for research and for extension and public services, and shall have the authority to designate the institutions to carry out research, extension and public service programs in so far as these functions shall maintain an inventory of all research programs and extension and public service activities being conducted by the various institutions, whether State-financed or not, within the limits imposed by security regulations governing defense contracts for research.

Sec. 13. The Commission shall make a continuing study of all phases of senior public higher education in Texas, whether expressly enumerated herein or not, for the purpose of improving its effectiveness and efficiency, and make appropriate reports thereon."

The Legislature of Texas, by establishing the Commission on Higher Education, has manifested its desire to at all times maintain a system of higher education which is responsive to the diverse needs and best interests of all the people of Texas.